

Class Action Monitor

The Future of Class Arbitration: Recent Supreme Court Jurisprudence on Arbitration Clause Interpretation and Enforceability

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This past term, as it did in 2010 and 2011, the Supreme Court again weighed in on class arbitration issues in two notable decisions: *Oxford Health Plans LLC v. Sutter* (*Oxford*)¹ and *American Express Co. v. Italian Colors Restaurant* (*AmEx*). *Oxford* and *AmEx*, issued by the Court just ten days apart, further refined the Court's growing body of class arbitration jurisprudence, which began with its plurality decision in *Green Tree Financial Corp. v. Bazzle* one decade ago. *Bazzle* served as the indisputable catalyst for the initiation of scores of class arbitrations and, concomitantly, the issuance of numerous disparate federal and state court decisions on various class arbitration issues. Many previously open questions concerning class arbitration post-*Bazzle* have now been decisively settled in the last few terms with the Court's rulings on the construction of arbitration clauses silent on the issue of class proceedings (in *Oxford* and *Stolt-Nielsen v. AnimalFeeds International Corp.*), and the enforceability of class arbitration waiver provisions (in *AmEx* and *AT&T Mobility LLC v. Concepcion*).

Oxford and *Stolt-Nielsen* establish that there must be some "contractual basis" for concluding contracting parties "agreed to authorize" class arbitration to justify the imposition of such proceedings. In these decisions, the Court explained that: (i) an intent to permit class arbitration may not be inferred simply by virtue of the parties' agreement to arbitrate their disputes; and (ii) if parties vest authority in the arbitrator to determine the availability of class proceedings under their clause, as long as the arbitrator is "even arguably" construing the clause, this ruling will be upheld under the FAA's highly deferential standard of review. On the flip side of the coin, the Court's opinions in *Concepcion* and *AmEx* make clear that arbitration clauses precluding class proceedings are virtually unassailable and must be enforced in accordance with their terms. Indeed, even where individual pursuit of claims (arising under either federal or state law) would not be economically viable, courts must generally enforce provisions prohibiting class arbitration.

Following these significant decisions by the Court, parties to existing arbitration agreements or parties contemplating the inclusion of arbitration clauses in their contracts should be mindful of the following: (i) a party that wishes to avoid class (or consolidated) arbitration may do so by explicitly withholding authority for arbitrators to conduct such proceedings in its arbitration agreements; and (ii) a party seeking to have meaningful judicial

review of any ruling construing whether its arbitration clause permits class arbitration should request judicial determination of the issue in the first instance and, if unsuccessful, should object to arbitral determination of the issue so as to preserve the issue for review.

These recent class arbitration-related decisions by the Court, along with the historical context in which they arose and perspectives on the future of class arbitration, are discussed in more detail below.

I. Class Arbitration: An Introduction

A. Substantive v. Procedural Arbitrability

The federal statutory framework for the enforcement of private parties' agreements to arbitrate is embodied in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the FAA). Section 2 of the FAA – the “primary substantive provision of the Act”² – provides that agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Section 4 of the FAA enables a party aggrieved by another’s failure or refusal to arbitrate to petition a district court for an order compelling arbitration, and if the court concludes that the “making of” the arbitration agreement or the “failure to comply therewith” are not in issue, the court shall compel arbitration “in accordance with the terms of the agreement.” 9 U.S.C. § 4.

The Supreme Court has interpreted these provisions of the FAA to delineate between the respective authority of courts and arbitrators to rule on various issues. Matters of “substantive arbitrability” – “gateway” issues to be resolved by courts – are narrowly circumscribed, limited only to: (i) whether the dispute falls within the scope of the parties’ arbitration agreement; (ii) whether the agreement to arbitrate is revocable on grounds at law or in equity; and (iii) where one of the parties asserts a federal statutory claim, whether Congress has clearly expressed an intent that the statutory claim not be arbitrated.³ All inquiries outside these threshold substantive arbitrability questions – including procedural prerequisites to arbitration, such as whether time limits, notice, laches, estoppel, and other conditions

precedent to an obligation to arbitrate have been met – are beyond the scope of a court’s authority under the FAA and must be decided by the arbitrator.⁴

Before the Court’s plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the determination of whether an arbitration agreement authorized class arbitration was generally thought to be a question of substantive arbitrability – *i.e.*, (i) whether the arbitration agreement at issue was sufficiently broad in scope to include the claims of third-party non-signatories where the clause was silent on the class issue, and (ii) whether the arbitration agreement was enforceable where the clause expressly excluded class proceedings – that federal courts would routinely resolve as a matter of the courts’ obligation to “rigorously enforce” arbitration agreements “according to their terms.”⁵

Virtually every federal appellate court confronted with the question concluded that class arbitration of claims was improper where the arbitration agreement was silent on the issue; generally, class arbitration was unavailable unless it was expressly provided for in the governing agreement.⁶ These federal courts reasoned that since they must enforce the express provisions of the contracts according to their terms, they lacked the authority to read into otherwise silent agreements terms permitting class or consolidated proceedings. As the Seventh Circuit Court of Appeals explained, Section 4 of the FAA “forbids federal judges from ordering class arbitration where the parties’ arbitration agreement is silent on the matter”; for a “federal court to read such a term into the parties’ agreement would disrupt [] the negotiated risk/benefit allocation and direct [] [the parties to] proceed with a different sort of arbitration.” *Champ*, 55 F.3d at 275 (citation omitted).

In a similar vein, under the FAA, courts would routinely decide the enforceability of agreements prohibiting class arbitration as a matter of substantive arbitrability. See generally 9 U.S.C. § 4. Pre-*Bazzle*, such clauses were almost universally held to be enforceable by federal appellate courts, save for the Ninth Circuit, whose state-law “*Discover Bank*” rule ultimately led to the Supreme Court’s decision in *Concepcion* invalidating the rule. See Pt. III(A) *infra*.⁷

B. The Razzle-Dazzle Effect of *Bazzle*

The issue presented for review in *Bazzle* was essentially whether, absent an express provision in an arbitration agreement providing for class arbitration, a state court or arbitrator could require class arbitration of state-law claims. The result was a splintered 4-1-3-1 decision. A plurality held that arbitrators are charged with the responsibility of deciding whether class arbitration of claims is allowed under clauses that are silent on the issue as a matter of contract interpretation. The plurality determined this inquiry is a procedural determination and not one of scope, since the issue embraced the “*kind of arbitration proceeding*,” rather than “*whether [the parties] agreed to arbitrate a matter*.” *Bazzle*, 539 U.S. at 452. The *Bazzle* plurality framed the inquiry for determination as “whether the contracts *forbid* class arbitration,” *id.* (emphasis added), and suggested specific language that would preclude class arbitration – e.g., all disputes shall be resolved by an arbitrator “selected by us to arbitrate this dispute and no other (even identical) dispute with another [third party].” *Id.* at 451. Predictably, in the aftermath of *Bazzle*, contracting parties began to include in their arbitration clauses language precluding class arbitration, which raised the attendant concern of enforceability that would later be borne out in subsequent decisions of the Court, including *Concepcion* and *AmEx*.

The *Bazzle* dissent concluded that the determination whether the disputes of third parties could be brought pursuant to the specific arbitration agreement at issue was a question of scope and, therefore, properly a substantive arbitrability determination for the court. In support of this position, the dissent explained that disputes under the agreement were to “be resolved by binding arbitration by one arbitrator selected by us with consent of you,” which – since “us” and “you” were specifically defined terms in the agreement – allowed a given arbitrator to hear only disputes between the two contracting parties, and that “[e]ach contract also specifies that it governs all ‘disputes ... arising from ... *this* contract or the relationships which result from *this* contract.’” *Id.* at 458-59 (Rehnquist, C.J., dissenting). Accordingly, the dissent concluded that the state supreme court had incorrectly decided

the scope of the pertinent arbitration agreements to encompass claims brought by third parties and had improperly permitted one arbitrator to decide the claims of all named and unnamed putative class members. *Id.* at 459-60.

Bazzle did not decide the larger issue of whether silence in an arbitration clause may be construed to permit or prohibit class arbitration; nevertheless, the decision would be heralded by numerous class arbitration claimants as authorizing class arbitration under silent arbitration clauses.⁸ Moreover, in stark contrast with the pre-*Bazzle* decisions of the Circuit Courts of Appeals, post-*Bazzle*, the overwhelming majority of American Arbitration Association (AAA) arbitrators (approximately 95 percent) concluded that class arbitration could be pursued under parties’ otherwise silent arbitration clauses.⁹ Notwithstanding the entirely disparate views of the federal appellate judiciary and arbitrators on the construction of silence as to the permissibility of class proceedings in an arbitration agreement – whereby the legal tide shifted from a nearly absolute inability to pursue class arbitration to a nearly absolute guarantee that class proceedings would be permitted – the Supreme Court would not revisit the issue until 2010.

II. Construction of Clauses Silent on the Issue of Class Arbitration

A. *Stolt-Nielsen*: Requiring a “Contractual Basis” for Finding the Parties “Agreed to Authorize” Class Arbitration

Stolt-Nielsen was the first case in which the Court was confronted with the fallout of its *Bazzle* decision. The issue presented in *Stolt-Nielsen* was “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the [FAA].” 130 S. Ct. at 1764. In answering this question in the negative, a majority of the Court reaffirmed the “basic precept that arbitration is a matter of consent, not coercion,” *id.* at 1772-73, concluding that the relevant inquiry is – consistent with the FAA, but in stark contrast with the *Bazzle* plurality decision – “whether the parties *agreed to authorize* class arbitration,” *id.* at 1776. *Compare id. with Bazzle*,

539 U.S. at 452 (“whether the contracts forbid class arbitration” (emphasis added)).

As the Court explained, prior to *Stolt-Nielsen*, many arbitrators and courts mistakenly believed that *Bazzle* “established the standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration.” *Id.* at 1772. However, “*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open.” *Id.* The Court also cast doubt upon the precedential value of the only ruling in *Bazzle*, which “require[d] an arbitrator, not a court, to decide whether a contract permits class arbitration.” *Id.* In this regard, the Court explained that because “only the plurality” in *Bazzle* decided this issue, it remained an open question; however, it was one the Court did not need to address in *Stolt-Nielsen*, because the parties “expressly assigned this issue to the arbitration panel.” *Id.*

On the merits, the Court concluded that – because the *Stolt-Nielsen* parties stipulated that they had reached no agreement on the issue of class arbitration – the arbitration panel exceeded its powers under section 10 of the FAA by imposing class arbitration. This is because “an arbitrator derives his or her powers from the parties’ agreement,” and “[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties.”¹⁰ The Court reasoned that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 1775. While the Court did not suggest what “contractual basis” would support a finding that parties “agreed to authorize” class arbitration, it nevertheless held that “[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”¹¹

B. Oxford: FAA Standard of Review Trumps the (De)Merits of Class-Related Arbitral Decisions

On June 10, 2013, three years following *Stolt-Nielsen*, a unanimous Court upheld an arbitral award finding the parties agreed to authorize class arbitration under a clause silent on the issue. The Court’s decision rested on the exceedingly narrow and highly deferential standard of judicial review under § 10(a)(4) of the FAA, which provides for vacatur of an arbitral award in circumstances where “arbitrators exceeded their powers.” According to the Court, when parties have bargained for an arbitrator’s construction of their agreement, an arbitral decision “even arguably” interpreting the contract may not be disturbed by a reviewing court. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). In reaching its decision, the Court distinguished *Stolt-Nielsen*, finding that the cases “fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.” *Id.* at 2070.

In *Oxford*, the plaintiff-physician brought suit on his own behalf and on behalf of a putative statewide class of New Jersey physicians against Oxford Health Plans LLC (Oxford) in New Jersey state court, asserting that Oxford had failed to provide sufficient and timely payments to the physicians in contravention of state law and its agreements with the physicians. Oxford moved to compel arbitration pursuant to an arbitration provision in its agreement with Sutter, which was granted by the state court. In its order compelling arbitration, the court held that the arbitrator would decide whether there could be class proceedings. Once in arbitration, the parties also agreed that “the arbitrator should decide whether their contract authorized class arbitration.” *Id.* at 2067.

The parties’ arbitration agreement provided: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.” *Id.* The arbitrator concluded that, based on a textual analysis, the clause “on its face ... expresses the parties’ intent that class arbitration can be maintained.” *Id.* (quotation omitted). He reasoned that

“the intent of the clause [was] to vest in the arbitration process everything that is prohibited from the court process,” including class actions, since they are a form of “civil action.” *Id.* (quotation omitted). Oxford filed a motion to vacate the arbitrator’s ruling under § 10(a)(4) of the FAA in New Jersey federal court. Both the district court and the Third Circuit rejected Oxford’s request for vacatur. See 2005 WL 6795061, at *8 (D.N.J. Oct. 31, 2005), *aff’d*, 227 Fed. Appx. 135 (3d Cir. 2007).

The arbitration proceedings continued on the merits until the Supreme Court issued its decision in *Stolt-Nielsen*, after which Oxford immediately requested that the arbitrator reconsider his clause construction ruling in light of that case. *Oxford*, 133 S. Ct. 2067. The arbitrator issued another decision holding that unlike *Stolt-Nielsen*, there was no stipulation by the parties that they had not agreed on the issue of class arbitration, which necessitated that he construe the parties’ agreement to discern their intent, and reaffirmed his prior ruling that “the arbitration clause unambiguously evinced an intention to allow class arbitration.” *Id.* at 2067-68 (quotation omitted). Oxford again requested vacatur, which was again denied by both the district court and the Third Circuit. See 2011 WL 734933, at *5 (D.N.J. Feb. 22, 2011), *aff’d*, 675 F.3d 215 (3d Cir. 2012). The crux of the Court of Appeals’ ruling was that, given the limited review available under Section 10(a)(4), “[s]o long as an arbitrator ‘makes a good faith attempt’ to interpret a contract, ‘even serious errors of law or fact will not subject his award to vacatur.’” *Oxford*, 133 S. Ct. at 2068 (quoting 675 F.3d at 220). The Supreme Court granted *certiorari* “to address a circuit split on whether § 10(a)(4) allows a court to vacate an arbitral award in similar circumstances.”¹²

Section 10(a)(4) of the FAA provides for vacatur of an arbitral award “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(4). A party seeking to vacate an arbitral award under this section “bears a heavy burden,” as vacatur is appropriate “only in very unusual circumstances.” *Oxford*, 133 S. Ct. at 2068 (quoting *First Options*, 514

U.S. at 942). Drawing upon its prior precedent, the Court explained that “[b]ecause the parties ‘bargained for the arbitrator’s construction of their agreement,’ an arbitral decision ‘*even arguably* construing or applying the contract’ must stand, regardless of a court’s view of its (de)merits.” *Id.* (quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000)) (emphasis added).

This is in stark contrast to the standard of review that would have been applied had Oxford “argued below that the availability of class arbitration is a so-called ‘question of arbitrability.’” *Id.* at 2068 n.2. Such “gateway” substantive arbitrability questions, which are presumptively for courts to decide, may be reviewed *de novo* absent clear and unmistakable evidence that the parties intended an arbitrator to resolve the issue. See *id.* However, because Oxford agreed that the arbitrator should resolve the question of whether its arbitration agreement with Sutter authorized class proceedings, the case did not present an opportunity for the Court to decide the still-open issue of whether the availability of class arbitration is a question of substantive arbitrability. *Id.* at 2071.

Under the applicable (highly deferential) standard of review, the Court concluded that because the arbitrator had twice “considered [the parties’] contract and decided whether it reflected an agreement to permit class proceedings,” this was sufficient to withstand vacatur. *Id.* at 2069. In response to Oxford’s arguments that under *Stolt-Nielsen*, the standard for vacatur is met where an arbitrator orders class arbitration “without a sufficient contractual basis,” the Court explained that the arbitrators’ ruling in *Stolt-Nielsen* was overturned “because it lacked any contractual basis for ordering class procedures, not because it lacked ... a ‘sufficient’ one.” *Id.* (emphasis in original). Specifically, the *Stolt-Nielsen* parties’ “stipulation” that they had not reached agreement on the issue of class arbitration necessarily meant that the arbitrators could not have divined the parties’ intent to authorize class arbitration in construing their agreement. See *id.* at 2069-70. In contrast, the *Oxford* parties did not have such a stipulation, and “the arbitrator did construe the contract ... and did find an agreement to permit class arbitration.” *Id.* at 2070. Because the *Stolt-Nielsen*

arbitrators did not simply misinterpret the contract, but abdicated their interpretive role, the Court continued, *Stolt-Nielsen* and *Oxford* “fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.” *Id.*

The Court concluded that the remainder of *Oxford*’s argument addressed the merits and thus rejected *Oxford*’s argument “because, and only because, it is not properly addressed to a court,” as under § 10(a)(4), “an arbitrator’s error – even his grave error – is not enough.” *Id.* As Justice Kagan noted, writing for the Court: “Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with *Oxford*’s contrary reading.”¹³ Justice Alito similarly explained in a concurring opinion: “Today’s result follows directly from petitioner’s concession [that the arbitrator should decide whether the parties’ agreement authorized class arbitration] and the narrow judicial review that federal law allows in arbitration cases”,¹⁴ “[i]f we were reviewing the arbitrator’s interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred ‘an implicit agreement to authorize class-action arbitration from the fact of the parties’ agreement to arbitrate.”¹⁵ Nevertheless, because “the arbitrator was ‘arguably construing’ the contract,” the Court concluded, “a court may not correct his mistakes under § 10(a)(4).” *Id.* (quoting *E. Associated Coal*, 531 U.S. at 62). “The arbitrator’s construction holds, however good, bad, or ugly,” because the potential for mistakes “is the price of agreeing to arbitration,” and since *Oxford* chose to arbitrate, “it must now live with that choice.” *Id.* at 2070-71.

III. Enforceability of Class Arbitration Waiver Provisions

A. *Concepcion*: The FAA Trumps State Law Invalidating Class Arbitration Waivers

In *Concepcion*, the Court (in a 5-4 decision) reversed the Ninth Circuit and held that the FAA preempts California state law that conditions the enforceability of arbitration agreements on the availability of class procedures. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1470 (2011). In the decision below, the Ninth Circuit held that an arbitration clause containing

a class waiver provision was unconscionable and unenforceable under the state supreme court’s ruling in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The Supreme Court concluded that the so-called *Discover Bank* rule was preempted by § 2 of the FAA, as the rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting the FAA. *Concepcion*, 131 S. Ct. at 1753 (quotation omitted).

The plaintiffs in *Concepcion* entered into cellular phone service agreements with AT&T Mobility LLC (AT&T) that provided for the arbitration of all disputes between the parties in non-class, non-consolidated proceedings. Notwithstanding the parties’ agreement to arbitrate their disputes, the plaintiffs filed a complaint against AT&T in California federal district court, which was subsequently consolidated with a putative class action. See *id.* at 1744-45. AT&T moved to compel arbitration of the plaintiffs’ claims under the terms of the parties’ agreement. The district court ultimately concluded that the agreement was unconscionable, unlawfully exculpatory, and unenforceable under *Discover Bank* because it disallowed class procedures. See *id.* at 1745 (citation omitted). In affirming the district court, the Ninth Circuit held that the *Discover Bank* rule was not preempted by § 2 of the FAA, as it was “simply a refinement of the unconscionability analysis applicable to contracts generally in California.” *Id.* (quotation omitted).

The issue presented for review to the Supreme Court was “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.” *Id.* at 1744. The majority held that although § 2 of the FAA preserves generally applicable contract defenses, it does *not* preserve state laws that “stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 1748. According to the Court, the *Discover Bank* rule requiring the availability of classwide arbitration did exactly that by “interfer[ing] with [the] fundamental attributes of arbitration” and “creat[ing] a scheme inconsistent with the FAA.” *Id.*¹⁶ Because “arbitration is a matter of contract,” the Court explained, § 2 of the

FAA was designed to place arbitration agreements on equal footing with other contracts, *id.* at 1745 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), so that they could be enforced according to their terms and the parties' intent would thereby be effectuated.¹⁷ The Court also emphasized the overriding goals of the FAA of promoting the informal, efficient, streamlined, and cost-effective resolution of disputes. *See id.* at 1749. The Court concluded that class arbitration, like bilateral arbitration, *must be consensual*; thus, to the extent such consent was not grounded in the *Concepcion* parties' arbitration agreement, but was instead "manufactured by *Discover Bank*," it "is inconsistent with the FAA." *Id.* at 1751.

B. AmEx: Concepcion Reprised (Class Arbitration Waivers Really Are Enforceable)

The issue presented for review in *AmEx* was "[w]hether the Federal Arbitration Act permits courts ... to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013). On June 20, 2013, the Supreme Court held (in a 5-3 opinion) that courts are not permitted under the FAA to invalidate contractual waivers of class arbitration simply because the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

The plaintiffs, a putative class of merchants that accepted American Express cards, had an agreement with AmEx containing an arbitration clause requiring arbitration of all disputes between the parties and providing that "there shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id.* The merchants claimed that AmEx violated § 1 of the Sherman Act by using its monopoly power in the market for charge cards to force the merchants to accept credit cards at rates 30 percent higher than the fees charged by other credit card companies. Notwithstanding the explicit class-waiver clause, the merchants filed a putative class action against AmEx in federal district court. AmEx moved to compel individual arbitration under the FAA, which was granted by the district court. *Id.* The Second Circuit reversed, finding

that the plaintiffs would be unable to vindicate their federal statutory rights if the class waiver provision was enforced, due to the prohibitive expert witness costs the plaintiffs would incur (estimated by an economist to potentially exceed \$1 million), for a maximum individual recovery estimated at roughly \$13,000 (or just under \$39,000 with trebling). *Id.*

The Court explained that the FAA requires enforcement of parties' arbitration agreements in accordance with their terms, even as to federal statutory claims, "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* at 2309 (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668-69 (2012)). In this regard, the Court explained that there is no conflict between the FAA and the federal antitrust laws, because "the antitrust laws [neither] guarantee an affordable procedural path to the vindication of every claim," nor "evinced an intention to preclude a waiver" of class procedures. *Id.* (quotation omitted). Thus, the class waiver provision could not be invalidated on the basis of some "contrary congressional command" under the antitrust laws.

The Court next addressed the applicability of a judicially created exception to the FAA, pursuant to which arbitration agreements may be invalidated where they prevent the "effective vindication" of a federal statutory right. *See id.* at 2310-11.¹⁸ In rejecting the plaintiffs' argument that enforcement of the class waiver provision would bar effective vindication because they would have no economic incentive to pursue individual arbitration of their antitrust claims, the Court explained that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311. While suggesting that arbitration provisions forbidding the pursuit of certain statutory remedies or imposing exorbitant filing and administrative fees that render access to the arbitral forum impracticable *might be* sufficient to trigger the "effective vindication" exception, the Court found the class waiver limiting arbitration to bilateral proceedings "no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Id.*

Indeed, *Concepcion* “all but resolves” *AmEx*, because the *Concepcion* Court “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system,’” *id.* at 2312 (quoting *Concepcion*, 131 S. Ct. at 1753), thereby making clear that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the protection of low-value claims,” *id.* at 2312 n.5. Thus, because the “effective vindication” exception was inapplicable, and the Second Circuit’s regime would require district courts and parties to litigate “the legal requirements for success on the merits claim-by-claim, and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success,” thus undercutting the entire purpose of arbitration (namely speedy dispute resolution), the Second Circuit’s decision was reversed. *Id.*

IV. Perspectives on the Future of Class Arbitration

The decision reached by the *Oxford* Court was based exclusively on two factors: (i) the parties’ agreement to submit to the arbitrator the issue of whether their clause authorized class arbitration; and (ii) the extremely narrow scope of judicial review available under § 10(a) (4) of the FAA. The Court left open the possibility that the availability of class proceedings in arbitration under a given agreement may be a question of substantive arbitrability for courts, rather than arbitrators, to decide. However, the Court left no room for doubt that, to the extent parties to an arbitration agreement leave such a determination to an arbitrator, any resulting arbitral decision will be effectively insulated from judicial scrutiny under the Court’s longstanding precedents. As the Court explained, the potential for arbitrator error – “even [] grave error” – “is [simply] the price of agreeing to arbitration.”

Thus, as a practical matter, parties to an arbitration agreement who desire meaningful review of class-related rulings should not leave the determination of whether the parties agreed to authorize class arbitration to the arbitrator and should instead seek judicial determination of the issue as one of

substantive arbitrability. To the extent the court declines to address construction of the clause and instead delegates determination of the issue to an arbitrator, the party should object to arbitral resolution of the question each step of the way so as to preserve the issue for judicial review. If the issue is preserved, under *Oxford*, it will likely be subjected to meaningful substantive review under a *de novo* standard, rather than the extremely narrow standard of review typically available under Section 10 of the FAA. Furthermore, if this standard applies, to the extent a ruling is made by either an arbitrator or a court that class arbitration is authorized based simply on the fact of the parties’ agreement to arbitrate their disputes, this would be improper and justify vacatur under both *Stolt-Nielsen* and *Oxford*.

The decisions in *Concepcion* and *AmEx* were driven by the Court’s desire to satisfy the FAA’s overarching goal of enforcing agreements to arbitrate in accordance with their terms and consistent with the parties’ intent. Neither state-law principles, nor the “effective vindication” exception for federal statutory claims justify invalidation of class waiver provisions under the FAA.¹⁹ Thus, contracting parties who wish to avoid the specter of class arbitration are well-advised to include express provisions disavowing the availability of class proceedings in arbitration, through limits on arbitrator authority to conduct class proceedings or otherwise. Additionally, parties should consider whether to include a provision stating that if class proceedings are allowed for any reason as to a particular claim or group of claims, then the arbitration shall be terminated as to that claim or group of claims, with any further proceedings on such claims taking place in court. By including such additional language, the drafting party may both reinforce the impermissibility of class proceedings and obtain the added protection of judicial overview and appellate review of class proceedings, should the arbitrator ignore the directives in the agreement. Drafters of arbitration clauses also should consider including language barring attempted consolidation of individual arbitration claims, which could potentially be the next wave of attempts at aggregated, multilateral arbitration now that class arbitration can be effectively guarded against by careful drafting.

- 1 Weil presently represents Oxford in the underlying arbitration and, in addition to serving as co-counsel in the case before the Supreme Court, also represented the company in the lower courts.
- 2 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).
- 3 See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *AT&T Techs., Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).
- 4 See, e.g., *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764-65 (1983); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).
- 5 See generally *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989).
- 6 Prior to *Bazzle*, the Circuit Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits had determined that class or consolidated arbitration of claims was improper where the arbitration agreement was silent as to the permissibility of such proceedings. See, e.g., *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 268 (2d Cir. 1999); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369, 377-78 (3d Cir. 2000); *Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir. 1999); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1035 (S.D. Miss. 2000), *aff'd* 265 F.3d 1059 (5th Cir. 2001); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989). The First Circuit stood alone in its view that consolidation of arbitration proceedings may be available absent the parties' agreement, see *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988), and the Tenth Circuit had not yet addressed the issue by the time the *Bazzle* opinion issued.
- 7 Compare, e.g., *Johnson*, 225 F.3d at 377-78, *Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 818 (11th Cir. 2001), and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) with *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003) and *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); see also Steven D. Millman, *Catching the Waive: The Third Circuit Joins the Growing Trend of Circuit Courts in Voiding A Class-Arbitration Waiver in Homa v. American Express Co.*, 55 VILL. L. REV. 1033, 1035-36 (2010) (noting the more recent federal circuit split concerning the enforceability of class arbitration bans, but that there "was once a staunch majority in favor of upholding class-arbitration waivers").
- 8 The *Bazzle* plurality opinion addressed only the issue of who decides this question, concluding that the arbitrator should make this determination in the first instance under applicable state contract law principles. See *Bazzle*, 539 U.S. at 452-53; see also *Stolt-Nielsen*, 130 S. Ct. 1758 (2010). Far from deciding that class proceedings are appropriate in the face of an otherwise silent arbitration clause, the Court specifically vacated the judgment of the South Carolina Supreme Court (which had held that a silent clause permitted class arbitration), and remanded the case so that the question could be resolved in arbitration. See *Bazzle*, 539 U.S. at 447.
- 9 As of the end of August, 2009, there were nearly 280 reported class arbitrations on the AAA Class Arbitration Docket (available at www.adr.org), 99 of which had reported "clause construction awards" where the issue of whether class arbitration could be pursued under the applicable arbitration agreement was contested by the parties. Of these, 94 resulted in arbitral decisions construing the silent arbitration clauses to permit class arbitration. See also P. Christine Deruelle & R. Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now*, THE METROPOLITAN CORPORATE COUNSEL, July 2007.
- 10 *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (citing numerous cases and internal quotation marks omitted). The Court also noted that rather than identify whether there existed a "default rule" in the FAA or the governing law "under which an arbitration clause is construed as allowing class arbitration in the absence of express consent," the panel instead improperly imposed class arbitration based on its view of sound policy. *Id.* at 1768-69.
- 11 See *id.* at 1775; see also *id.* at 1776 ("[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.").
- 12 *Oxford*, 133 S. Ct. at 2068. The Second and Fifth Circuits had addressed the same issue decided by the Third Circuit in *Oxford* and reached diametrically opposite rulings. Compare *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630, 642-43, 646 (5th Cir. 2012), *reh'g denied*, No. 11-50509 (June 15, 2012) with *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 117 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

- 13 *Oxford*, 133 S. Ct. at 2070; *see also id.* at 2071 (the arbitrator’s “interpretation [of the arbitration clause] went against *Oxford*, maybe mistakenly so”).
- 14 *Oxford*, 133 S. Ct. at 2071 (Alito, J., concurring). Justice Alito went on to articulate serious concerns about the due process rights of absent class members and the related possibility of collateral attacks on the arbitrator’s rulings in the case. *See id.* at 2071-72; *see also Bazzle*, 539 U.S. at 459-60 (Rehnquist, C.J., dissenting).
- 15 *Oxford*, 133 S. Ct. at 2071 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775) (alterations omitted).
- 16 The Court also explained: “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision,” such as through application of the *Discover Bank* rule. *Concepcion*, 131 S.Ct. at 1752.
- 17 *See id.* at 1745 (citing *Volt*, 489 U.S. at 478 and *Rent-A-Center, W., Inc. v. Jackson*, 131 S. Ct. 2772, 2775 (2010)).
- 18 The Court began by tracking the genesis of the judge-made “effective vindication” exception, which “originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on ‘public policy’ grounds, arbitration agreements that ‘operat[e] ... as a prospective waiver of a party’s *right to pursue* statutory remedies.” *AmEx*, 133 S. Ct. at 2310 (quoting *Mitsubishi*, 473 U.S. at 637). While the Court acknowledged that its “[s]ubsequent cases have similarly asserted the existence of an ‘effective vindication’ exception,” they have “declined to apply it to invalidate the arbitration agreement at issue.” *Id.* (citations omitted).
- 19 The Court found no conflict between the federal antitrust laws and the FAA in *AmEx*; however, it is notable that in reaching its decision, the Court discussed *Gilmer*, a case in which the Court enforced a class waiver provision in the context of a plaintiff’s pursuit of a federal statutory claim that expressly permits collective action. *See Amex*, 133 S. Ct. at 2311 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1995)). It would appear that the only remaining unexplored source of law to which parties to arbitration agreements could resort to seek to skirt class arbitration waivers is federal common law – an area of law that is underdeveloped, uncertain, and virtually undefined. *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585 (2006).

Class Action Monitor is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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